CONSTITUTIONAL LAW — SEPARATION OF POWERS — POWER OF THE HOUSE OF REPRESENTATIVES TO PUNISH FOR CONTEMPT. — Charges of misconduct, preferred against a United States District Attorney, had been referred by the House to the Committee on the Judiciary. That body proceeded to examine into the truth of the charges. During the pendency of the examination, the accused published in the newspapers a signed letter severely criticising the committee's actions and impugning the honesty of their motives. Upon a vote of the House, the Speaker caused his arrest for contempt, whereupon the District Attorney applied for a writ of *habeas corpus*. *Held*, that he be remanded to custody. *U. S. ex rel. Marshall* v. *Gordon*, 235 Fed. 422 (U. S. Dist. Ct., S. D., N. Y.).

For a discussion of this case, see NOTES, p. 384.

CORPORATIONS — STOCKHOLDERS — INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — PROTECTION FROM CREDITOR BY NO RECOURSE CLAUSE. — A stockholder in a Missouri corporation paid for his stock with overvalued property. A statute required payment of full value. The corporation being insolvent, one of its bondholders seeks to recover from the stockholder on his statutory liability. The stockholder sets up an agreement incorporated by reference into the bond, providing that the creditor should have no recourse against a stockholder. *Held*, this was a good defense. *Babbitt* v. *Read*, 236 Fed. 42.

There are three possible theories as to the nature of the statutory liability of a stockholder who has paid for his stock with overvalued property. See 29 HARV. L. REV. 854. Of these the "trust fund" theory is historically the first. It, however, has never been applied so as to impose an actual trust upon the corporation in favor of its creditors. See *Graham* v. *Railroad Co.*, 102 U. S. 148, 160. *Wabash, etc. Ry. Co.* v. *Ham*, 114 U. S. 587, 594. In reality, in its application it differs from the second or third theories, according as it is conceived to grant recovery to all creditors or only to those without notice, in nothing but its terminology and the vagueness of the principle applied. Under the second theory the corporation's release of the stockholder from his obligation to pay the full par value of his stock is rendered void by the statute. The creditor's right is then to enforce the stockholder's liability as an equitable asset. By contracting not to hold the stockholder liable, he is simply cutting himself off from reaching certain assets of the corporation. There is no reason of policy for questioning the validity of this limitation. *French* v. *Teschemaker*, 24 Cal. 518. Thus a creditor's contract to go only against partnership assets, leaving untouched the partners' individual liability, is upheld. See LINDLEY, PARTNERSHIP, 8 ed., 244. The third theory is based upon the so-called "holding out" idea. This seems to be the ground of the Missouri decisions. *Colonial Trust Co.* v. *McMillan*, 188 Mo. 547, 567, 87 S. W. 933, 939. Under this view a corporation bargaining for the exemption of its stockholders is in the position of one deceiver stipulating for the immunity of a joint tortfeasor. But where, as part of a scheme to defraud, a clause in a contract is inserted to exempt a party from the consequences of his fraud, that waiver, being itself based upon fraud, may be set aside. *Bridger* v. *Goldsmith*, 143 N. Y. 424, 38 N. E. 458. See 21 HARV. L. REV. 218. Though if the party proposing the exemption, being innocent, wishes merely to protect himself from inadvertent statements or omissions, as where a statute requires him to publish certain facts in a prospectus, such a clause has been upheld. *Macleay* v. *Tait*, [1906] A. C. 24, 27, 34. In the principal case there was no evidence of an intent fraudulent in fact on the part of the corporation. *Cf. Babbitt* v. *Read*, 215 Fed. 395, 418. Since, however, under the "holding out" theory the statute declares that the doing of certain prohibited acts shall be equivalent to the making of misrepresentations such as ground an action for deceit, it might well be argued that by analogy the

exemption clause, when itself part of the scheme to issue fully paid-up stock for overvalued property, should be void. Another difficulty with the defense arises from the fact that, the creditor's right against the stockholder being direct, the stockholder is availing himself as beneficiary of a defense created for him by a contract to which he was a stranger. Neither of these objections to the defense, however, seems insuperable. As a matter of authority the validity of a stockholder's exemption clause has been unanimously sustained, without, however, any attempt to differentiate as to possible bases of the liability. *Brown* v. *Eastern Slate Co.*, 134 Mass. 590; *Basshor & Co.* v. *Forbes*, 36 Md. 154; *Bush* v. *Robinson*, 95 Ky. 492, 26 S. W. 178; *Grady* v. *Graham*, 64 Wash. 436, 116 Pac. 1098. But *cf. Kreisser* v. *Ashtabula Gas Light Co.*, 24 Ohio Cir. Ct. R. 313.

CRIMINAL LAW — SUSPENSION OF SENTENCE. — A prisoner was convicted in a District Court of the United States for embezzlement in violation of section 5209 REVISED STATUTES, and sentenced to imprisonment for five years, the minimum provided for by the statute. The judge, then, over the objection of the United States District Attorney, ordered the suspension of execution of the sentence, during the good behavior of the prisoner, and extended the term of the court for five years. The United States seeks from the Supreme Court a writ of *mandamus*, directing the judge to vacate the order. *Held*, that *mandamus* should issue. *Ex parte United States, Petitioner*, U. S. Sup. Ct., Oct. Term, 1915, No. 11 original.

For a discussion of this case, see NOTES, p. 369.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY IN GENERAL — ADDITIONAL LIABILITY FOR INJURY CAUSING DEATH. — Section 1 of the Federal Employers' Liability Act provides that where the employee of an interstate carrier is negligently killed, his representative may recover for the benefit of the next of kin. U. S. COMP. STAT. 1913, § 8657. Section 9 provides that where an employee is injured, his right of action shall survive to his representative for the benefit of the next of kin. U. S. COMP. STAT., § 8665. An employee of an interstate carrier was injured, and, after having lived ten minutes in an unconscious condition, died from the injury. His representative seeks to recover under both statutes. *Held*, that he may recover only under the death statute. *Great Northern Ry. Co.* v. *Capital Trust Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 107.

Many states have statutes similar to those in the principal case. See TIFFANY, DEATH BY WRONGFUL ACT, 2 ed., § 26. Most courts hold that there may be a recovery under the survival statutes, even if death results from the injury. *Missouri, etc. Ry. Co.* v. *Bennett*, 5 Kan. App. 231; *Brown* v. *Chicago, etc. Ry. Co.*, 102 Wis. 137, 77 N. W. 748. *Contra, Merrihew* v. *Chicago, etc. Ry. Co.*, 92 Ill. App. 346; *Lubrano* v. *Atlantic Mills*, 19 R. I. 129, 32 Atl. 205. And a majority of the states allow recovery under the death acts, although death is not immediate. *Brown* v. *Buffalo, etc. R. Co.*, 22 N. Y. 191. See *Roach* v. *Imperial Mining Co.*, 7 Fed. 698, 704. *Contra, Sawyer* v. *Perry*, 88 Me. 42, 33 Atl. 660; *Dolson* v. *Lake Shore, etc. Ry. Co.*, 128 Mich. 444, 87 N. W. 629. It would follow that the facts may be such as to satisfy both statutes. The theories of the two actions are entirely different. See 15 HARV. L. REV. 854. Consequently most jurisdictions permit a recovery under both, where the facts permit it. *Leggott* v. *Great Northern Ry. Co.*, 1 Q. B. D. 599; *Mahoning Valley Ry. Co.* v. *Van Alstine*, 77 Ohio St. 395, 83 N. E. 601. See *Stewart* v. *United Electric Light & Power Co.*, 104 Md. 332, 344, 65 Atl. 49, 54; *Murphy* v. *St. Louis, etc. R. Co.*, 92 Ark. 159, 163, 122 S. W. 636, 638. *Contra, Sweetland* v. *Chicago, etc. R. Co.*, 117 Mich. 329, 75 N. W. 1066. It would seem to be immaterial that the same person may receive the benefit of both actions. But, where the death